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No. 93-1047

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETER BRANTON,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS PEOPLE FOR THE AMERICAN WAY AND WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS IN RESPONSE

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This case comes before the Court in an unusual posture. Respondents People for the American Way and Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights ("PFAW/WACCI-VCR"), who oppose Petitioner on the merits of his indecency complaint, nevertheless ask this Court to grant the pending petition for a writ of *certiorari* because of the dangerous precedent set by the lower court's *sua sponte* misapplication of standing doctrine in this case. In denying standing to Petitioner without input from any litigant, the lower court created a clear conflict with well established precedent related to listener standing in FCC cases and with rulings of this Court. The lower court's decision has potentially widespread, adverse ramifications for the

public, broadcasters, and the FCC, which relies on listeners as private attorneys general in enforcing its regulations.

STATEMENT OF THE CASE

This case concerns the efforts of Petitioner Peter Branton to seek review of the FCC's denial of his complaint alleging that National Public Radio ("NPR") broadcast indecent material during its early evening news program "All Things Considered" in violation of 18 U.S.C. §1464. The FCC's Mass Media Bureau adjudicated Petitioner's complaint on the merits, finding that the broadcast material identified was "not actionably indecent." *Letter from Edythe Wise, Chief, Complaints and Investigations Branch, FCC Mass Media Bureau, to Peter Branton* dated October 26, 1989. Petitioner's letter inquiring about procedures for appeal was accepted by the full Commission as an Application for Review, and was denied on the ground that the broadcast material, contained in a "*bona fide* news story," was not "gratuitous, pandering, titillating or otherwise 'patently offensive'" and thus did not violate the FCC's indecency standard. *Petition for Writ of Certiorari* at 16a-17a. Petitioner sought review of the adverse adjudication in the United States Court of Appeals for the D.C. Circuit under Section 402 of the Communications Act, 47 U.S.C. §402, which provides "an explicit right of review to all persons adversely affected or aggrieved by particular [FCC] actions." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 394 n.8 (1987).

On review by a panel of the D.C. Circuit, neither the federal Respondents nor any of the Intervenors challenged Petitioner's standing to contest the FCC's decision on the merits.[1] At the court's request, the parties submitted post-argument supplemental briefs concerning the relevance of *Heckler v. Chaney*, 470 U.S. 821 (1985) to this case. In their briefs, all the litigants agreed

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[1]PFAW/WACCI-VCR intervened before the D.C. Circuit to support affirmance of the FCC's decision because of their members' interest in protecting the First Amendment right of adults to hear news and other broadcast programming free of government censorship.

that the FCC's decision was reviewable under *Heckler v. Chaney*, primarily because the FCC had adjudicated the complaint on the merits rather than exercising its discretion not to decide the complaint. The court of appeals' opinion contains no reference to this issue.

Notwithstanding the absence of any prior mention of standing in this litigation, the panel, per D.H. Ginsburg, J., concluded *sua sponte* that Petitioner lacked standing. Construing the alleged injury to be personal to Petitioner, the panel ruled that a "past injury cannot establish the standing of a complainant...who seeks neither damages nor other relief for that harm," and that Petitioner had failed to demonstrate that his injury could be redressed by FCC action because "it is speculative" whether such action would prevent radio broadcasters from broadcasting indecency in the future. *Branton v. FCC*, 993 F.2d 906, 909, 911 (D.C. Cir. 1993).

Despite their opposition to Petitioner on the merits, PFAW/WACCI-VCR filed a petition for rehearing and suggestion for rehearing *en banc*, because of the serious adverse precedential impact of the panel's decision. Respondents FCC and the United States supported the petition, explaining that the court had "erred in its conclusion that petitioner lacked standing," that the panel's decision was "inconsistent with the approach to viewer/listener standing that this Court and the FCC have followed," and that the panel's reasoning on the causation/redressability prong contradicted the FCC's conclusion that "enforcement will deter future violations." *Response to Petition for Rehearing* (Aug. 31, 1993) ("FCC and U.S. Response to Petition for Rehearing"), at 1-3, 7. Nevertheless, the court denied the petition for rehearing and suggestion for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This case presents the extremely rare situation where none of the litigants raised the issue of standing below and the government agency affected has agreed that there is standing, and yet the lower court reached a contrary conclusion, *sua sponte*, on the basis of standards which contravene established FCC-related law

and the dictates of this Court. Because the lower court's decision conflicts with all prior jurisprudence on listener standing in FCC actions as well as precedent in this Court, and because this decision will have a significant adverse impact on the public interest, Respondents PFAW/WACCI-VCR support the petition for a writ of certiorari. Specifically, the writ should be granted for the following reasons:

1. *The panel's decision conflicts with all prior court decisions on listener standing in FCC actions.* Following the D.C. Circuit's landmark decision in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) ("*UCC I*"), the FCC has afforded viewers and listeners standing "to seek judicial review of FCC actions involving a statute, rule or policy of which viewers or listeners are the obvious beneficiaries." FCC and U.S. Response to Petition for Rehearing, at 3.[2] As the FCC argued below, prior to the lower court's decision in this case, "no one has argued -- and no court has even suggested -- that the 'immediacy' element of constitutional standing analysis, as applied to a viewer/listener's challenge to FCC rejection of an argument related to broadcast programming, required anything more than that the viewer/listener reside within the service area of the station at issue." *Id.*

This Court has long recognized the foundation for listener standing, ruling that under Section 402 of the Communications Act of 1934 ("the Act"), Congress conferred standing on private litigants to appeal adverse FCC actions, but "only as representatives of the public interest." *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) (internal citation omitted). This Court further stated that courts, no less than administrative agencies, have broad power to vindicate this public interest. *Id.* at 14-15.

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[2]As Petitioner noted, while the standards for agency standing and Article III may differ, the courts and the FCC have applied the same Article III analysis. *See UCC I*, 359 F.2d at 1000, n.8. Under the same Article III analysis, the FCC apparently found in this case that Petitioner met the constitutional requirements for standing.

In *UCC I*, then-Judge Burger firmly established the principle of listener standing, finding that listeners, as members of the "consuming public", have "an obvious and acute" interest in FCC regulation of broadcasters. 359 F.2d at 1002. In support of this principle, Judge Burger recognized the essential role of listeners serving as "private attorneys general" to bring programming problems or violations to the FCC's attention and to appeal in court if necessary. *Id.* at 1003-1005. This Court has cited *UCC I* with approval on several occasions, including in its discussions of standing.[3]

Following *UCC I*, at least four different courts of appeal in addition to the D.C. Circuit have extended this principle to afford citizen standing "in virtually every...situation involving broadcast programming regulation...." *Maier v. FCC*, 735 F.2d 220, 229 (7th Cir. 1984). *See Council for Employment & Economic Energy Use v. FCC*, 575 F.2d 311 (1st Cir. 1978) (fairness doctrine); *NBMC v. FCC*, 791 F.2d 1016 (2d Cir. 1986) (broadcast frequency allocations); *Maier v. FCC*, 735 F.2d 220 (7th Cir. 1984) (fairness doctrine and personal attack complaints); *ACLU v. FCC*, 523 F.2d 1344 (9th Cir. 1975) (cable access channels). *See also Llerandi v. FCC*, 863 F.2d 79, 85 (D.C. Cir. 1988) (radio ownership rules); *Geller v. FCC*, 610 F.2d 973, 976 n.26 (D.C. Cir. 1979) (cable-broadcast copyright rules); *Illinois Citizens Committee v. FCC*, 515 F.2d 397 (D.C. Cir. 1975) (obscenity issue in forfeiture proceeding against licensee); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970) (excessive concentration of media ownership).

The decision below clearly contradicts these precedents, creating conflicts between the circuits and serious uncertainty in the law in this area. Perhaps more importantly, it threatens to significantly harm the public interest by severely limiting listener standing.

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[3]*See, e.g., CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981); *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976); *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970).

2. *The decision below raises issues of exceptional importance because of its implications for the rights of radio and television listeners and for resolving issues of alleged broadcast indecency*. The court below failed to recognize that listeners are the primary beneficiaries of broadcast regulation, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), and that the FCC has placed great reliance on listeners as "private attorneys general" to identify potential regulatory problems. *See UCC I*, 359 F.2d at 1002. In the context of indecency, for example, the FCC does not take action on its own initiative or issue declaratory rulings on planned programs, but relies exclusively on listener complaints. *See William J. Byrnes*, 63 RR2d 216 (1987). Judicial review of such complaints where necessary is an important component of this process, assuring listeners and parents of redress if the agency errs.

In the specific context of indecency enforcement, moreover, there are important reasons for prompt judicial review based on a contemporaneous record, rather than waiting up to seven years until license renewal time to consider the issue, as suggested by the panel below. Prompt, contemporaneous rulings on the scope of indecency enforcement are critical to protecting the First Amendment rights of broadcasters and listeners. Without contemporaneous adjudications, broadcasters might avoid presenting news and other innovative programming that could conceivably risk "indecency" violations and loss of their license. Prompt adjudications are necessary to prevent such self-censorship, which shackles the broadcaster and deprives the listening public of valuable programming that they otherwise would have received.[4] In addition, broadcasters and the public, including those like the

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[4]In fact, several respondents here, including NPR, are parties in another case on appeal to the D.C. Circuit, *Action for Children's Television v. FCC*, No. 93-5178, which specifically contends that FCC procedures for the imposition and judicial review of broadcast indecency sanctions violates the First Amendment by not providing for sufficiently prompt disposition of indecency complaints.

Petitioner interested in preventing what they regard as indecent broadcasts, have an interest in prompt adjudications of indecency complaints so that broadcasters do not unwittingly continue to present material that years later is deemed to be "indecent." Particularly because of the central role of the D.C. Circuit in FCC matters, the decision below frustrates these important interests, warranting review.

This conclusion is illustrated by the concerns expressed by broadcasters in this very case. Notwithstanding their arguments in this Court, Respondents NPR *et al.* specifically explained below that in the indecency context, "it is vital that challenges [by members of the public] be resolved promptly and contemporaneously by the FCC *and the courts*." Response to Suggestion for Rehearing *En Banc* at 3 (emphasis added). They further maintained that "serious problems would arise if such challenges could be deferred until license renewal -- which in the case of a radio station might not occur until some seven years after the disputed broadcast." *Id.* As *NPR et al.* explained, broadcasters' most likely response would be to self-censor programs that "could conceivably generate indecency complaints and the loss of [their] license," and such self-censorship could be "minimized only if all indecency complaints are fully and finally resolved promptly after the broadcast," *id.*, a result precluded by the decision below.

3. *The panel's decision conflicts with applicable decisions of this Court.* In ruling that Petitioners had not met the requirements for standing, the lower court concluded that it was speculative whether NPR would change its programming in response to FCC sanctions. *Branton v. FCC*, 993 F.2d at 911. The court based its conclusion on the faulty notion that radio stations might intentionally flout the FCC's indecency rules, deciding that the benefits of broadcasting similarly indecent material outweigh the costs of breaking the law and incurring FCC fines. *Id.* The court's reasoning has no basis in the record, in actual practice, or in this Court's precedent, and would ratchet up this Court's requirements for standing to an insurmountable level. It sets a dangerous precedent that should be reviewed by this Court.

The court below effectively stood logic on its head by arguing that a publicly accountable institution with no prior history of violating FCC regulations will rationally choose to break the law. To the contrary, the logical presumption is that public and regulated private institutions will conform their behavior to the law as established in administrative and judicial decisions. As the FCC explained below, "a fundamental assumption underlying the FCC's enforcement of 18 U.S.C. §1464 is that such enforcement will deter future violations of this statutory provision." FCC and U.S. Response to Petition for Rehearing, at 7. Indeed, the court's reasoning would call into question the FCC's entire scheme of licensing and enforcement.

In this regard, the lower court grievously misapprehended the very nature of the licensing process in assuming that whether or not to violate an FCC regulation is merely a cost-benefit decision based on the dollar value of any sanction. Major violations of FCC rules are rare, presumably because licensees are chosen to serve as fiduciaries based on their character, *see* 47 U.S.C. 308(b), and "the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act ...." *Character Qualifications*, 102 FCC2d 1179, 1183 (1984). They tend to comply with the law because of who they are, not just because of the fear of being caught. While the enforcement process exists to deal with the rare exception, broadcasters go to extraordinary lengths to operate lawfully.[5] Indeed, as the lower

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[5]The panel's suggestion that public broadcasters are less likely to comply with FCC regulations because the prospect of sanctions has lesser deterrent effect on them, *Branton v. FCC*, 993 F.2d at 911, is particularly inapt. Many public broadcasters are state and municipal agencies, and virtually all of them rely at least in part on appropriated federal, state and local funds as well as charitable donations. Their accountability is tested in on-air fundraising, a far more direct measure of acceptance than that faced by their commercial counterparts; news that donors' (or taxpayers') money was forfeited to the FCC could have a devastating impact on them. Their responsiveness is also insured under 47 U.S.C. §396(k)(8)(A), which requires public broadcasters to

court failed to recognize, any broadcaster who willfully or repeatedly violates FCC regulations risks not only a substantial fine, but the threat of far worse penalties, including denial of approval to acquire new stations, permanent revocation of its license, or criminal penalties. *See* 47 U.S.C. §312(a)(6); 18 U.S.C. §1464.

Particularly under these circumstances, the decision below clearly conflicts with applicable precedent in this Court. Unlike cases where this Court has found the effectiveness of sanctions to be too speculative, the nature of the FCC licensing and enforcement scheme and actual practice indicate clearly that FCC enforcement against accountable institutions will have their intended effect. *Compare, e.g., United States v. SCRAP*, 412 U.S. 669 (1973) (finding standing where causation and redressability rested on a far more speculative and attenuated chain of events). In addition, contrary to the lower court's suggestions this Court has never endorsed an argument that enforcement actions may be too speculative because an institution with no history of violating the law might nevertheless intentionally choose to do so on the basis of a crude economic cost/benefit analysis ignoring all other political, social, or moral factors. For example, while the Court in *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976), stated that charitable hospitals might forgo favorable tax treatment to avoid the increased financial costs of providing free medical care, the Court never argued that the hospitals might simply violate an Internal Revenue Service decision requiring the hospitals to provide a higher amount of free medical care. Thus, unless there is some evidence in the record of a prior history of violating the law at issue, *see, e.g., Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), there is absolutely no basis for a court finding relief too speculative because a law-abiding entity

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have community advisory boards. NPR itself has explained the fallacy of the the court's assumption. *See Brief for Respondents National Public Radio, Public Broadcasting Service, Radio-Television News Directors Association and the Reporters Committee for Freedom of the Press in Opposition* ("Brief for Respondents NPR *et al.*") at 9 n.9.

might suddenly decide to violate the law.

In direct conflict with the panel's approach, this Court has long made clear that there is a strong presumption that a party, particularly one subject to federal regulation, will obey, not flout, the law. *See, e.g., Cooper v. Dasher*, 290 U.S. 106 (1933); *Leroy Fibre Co. v. Chicago, Milwaukee & St. Paul Railway*, 232 U.S. 340 (1914). In addition, this Court has ruled that predictive judgments by agencies like the FCC should be accorded judicial deference. *See FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981); *FPC v. Gas Pipeline Corp.*, 365 U.S. 1, 29 (1961). In the context of this case, as NPR itself has stated, the "dire consequences" of broadcasting "material deemed to be indecent" make clear that a ruling that the use of four-letter words in radio newscasts *would* alter future broadcasts, and that such a conclusion is far from speculative. Brief for Respondents NPR *et al.*, at 9 n.9.

The lower court's decision, if allowed to stand, will pose an insurmountable barrier in future cases, because a party seeking standing will be forced to somehow disprove that an institution or individual with no prior history of lawlessness might violate the law. This would impose an impossible hurdle that is not supported by this Court's decisions with respect to Article III standing requirements, and contradicts applicable precedent.

CONCLUSION

For the foregoing reasons, Respondents PFAW/WACCI-VCR respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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